P.E.R.C. NO.23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JERSEY CITY DEPARTMENT OF PUBLIC WORKS

Public Employer

and

JERSEY CITY PUBLIC WORKS EMPLOYEES, INC.
LOCAL 245

Docket No. R-9

Petitioner

and

AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 1959

Intervenor

DECISION AND DIRECTION OF SECOND ELECTION

Pursuant to an Interim Report of ad hoc Hearing Officer Joseph F. Wildebush setting forth an agreement of the parties, a secret ballot election was conducted under the supervision of the Commission's election officer on May 15, 1969 among the employees in the unit described below. The Commission's election officer served upon the parties a tally of ballots, which showed that of 449 ballots cast, 186 were for the Petitioner, 216 were for the Intervenor, 14 were for neither organization, 24 ballots were challenged and nine were void. The Petitioner filed timely objections to the conduct and results of the election which were supplemented by a letter dated May 29, 1969.

Pursuant to Chapter 303, New Jersey Public Laws of 1968, a hearing was held on October 18 and 19, 1969 before Jonas Silver, ad hoc Hearing Officer of the Commission.

The objections and supplemental objections are fully set forth in Hearing Officer Silver's Report which is attached.

On October 22, 1969 Hearing Officer Silver issued his Report and Recommendations, recommending that certain objections be sustained and a second election be directed. No exceptions to the Report and Recommendations have been filed.

The Commission has considered the Hearing Officer's Report and Recommendations and in the absence of exceptions, the election conducted on May 15, 1969 is hereby set aside and a second election is directed. In addition to the grounds relied upon by the Hearing Officer in recommending that the election be set aside, the Commission finds that in light of Mr. Robert Murphy's position as Assistant Director of Sanitation of the Department of Public Works, his activities in soliciting members and in campaigning on behalf of the Intervenor were improper.

The Commission finds that the aforementioned activities engaged in by an individual occupying a position such as that occupied by Mr. Murphy tends to improperly interfere with the employees' freedom of choice in the selection of a negotiating representative. The rerun election shall be conducted among the employees in the unit previously found appropriate.[1/] The election shall be conducted as soon as possible but not later than thirty (30) days from the date set forth below.

The election directed herein shall be in accordance with the Commission's Rules and Regulations and Statement of Procedure.

1/ The appropriate unit shall consist of all white collar and blue collar employees in the Department of Public Works, excluding craft employees, professional employees and supervisory and managerial employees.

Eligible to vote are all employees listed in the unit set forth in Footnote 1 who were employed during the payroll period immediately preceding the date below, including employees who did not work because they were out ill, or on vacation, or temporarily laid off, including those in military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Those eligible to vote shall vote on whether or not they desire to be represented for the purpose of collective negotiations by the Jersey City Public Works, Employees, Inc., Local 245; American Federation of State, County and Municipal Employees, AFL-CIO, Local 1959; or neither.

BY ORDER OF THE COMMISSION

WALTER F. PEASE
CHAIRMAN

DATED: November 5, 1969
Trenton, New Jersey

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JERSEY CITY DEPARTMENT OF PUBLIC WORKS

-and-

JERSEY CITY PUBLIC EMPLOYEES, INC., LOCAL 245

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 1959

Docket No. R-9

APPEARANCES:

For Local 245
John W. Yengo, Esq.

For AFSCME, Local 1959
Rothbard, Harris, & Oxfeld, Esqs.
By: Abraham L. Friedman, Esq.

For Jersey City Department of Public Works
Raymond A. Kierce, Director, Department of Personnel

REPORT AND RECOMMENDATIONS OF HEARING OFFICER

Upon objections to the conduct of the election and conduct affecting the results of the election filed by Jersey City Public Employees, Inc., Local 245, hereinafter referred to as Local 245, and it appearing that the matter could best be resolved by record testimony and evidence, hearing in this proceeding was held at Newark, New Jersey, on August 18, and 19, 1969, before the undersigned ad hoc Hearing Officer. At the hearing, the parties were given full opportunity to present testimony, evidence and argument in support of their respective contentions. Upon the entire record in this proceeding, the Hearing Officer finds:

A. Preliminary events; the alleged objections

On May 15, 1969, the American Arbitration Association, hereinafter

referred to as the Administrator, following a request from the New Jersey Public Employment Relations conducted an election to determine the negotiations representative in a unit of non-supervisory white collar and blue collar employees of the Jersey City Department of Public Works, hereinafter referred to as DPW. Appearing on the ballot were the designated employee organizations--Local 245, and American Federation of State, County and Municipal Employees, Local 1959, hereinafter referred to as Local 1959, and "neither organization".

Following the counting of the ballots, the parties, including the Administrator, signed a sheet of paper headed "Tally of Ballots", on which appeared:

"Local 1959 - 216
Local 245 - 186
Challenges - 24
Void - 3
Signed (I.D.) - 6
Neither - 14

"There are 448 signitures [sic] on the registration list. There are 449 ballots in the box."

Thereafter, by letter to the Commission dated May 16, 1969, Local 245, set forth a "demand" that the aforesaid election "be voided and arrangements for a proper election be made," assigning thereto the following "grounds":

"1. Jersey City Public Employees, Inc., Local 245 was not furnished with a list of names and addresses of Public Works employees as agreed.

2. Jersey City Public Employees, Inc. was prejudiced in that the election was not held before May 13th, 1969 on which date the Municipal election was held.

3. Jersey City Public Employees, Inc. was not given equal time and opportunity to campaign for the election.

4. Local 1959, AFSCME, AFL-CIO was represented by management in the person of Robert Murphy.

5. Jersey City Public Employees, Inc. was prejudiced as the result of the joint sale and membership drive by Local 1959. The sale being that of insurance and the fact that employees were told that you had to be a member of 1959 to get the insurance.

6. The City of New Jersey negotiated with Local 1959 while the election for bargaining agent was pending or in the process of being arranged.

7. The total number of employees who signed the registry for voting numbered 448 and there were 449 ballots cast. This election could be decided by one vote and for this reason alone the election should be voided.

8. Local 1959 were [sic] in a favored position with the City of Jersey City in that there were negotiations leading the employees [sic] Local 1959 was the bargaining agent."

The Notice of Hearing herein dated July 25, 1969, refers to the "Objections, attached hereto," as "the matter. . .best. . .resolved by record testimony and evidence. . .", which attached objections are the Local 245 letter of May 16, quoted above. At the hearing, Local 245 sought to adduce testimony bearing on certain alleged grounds for setting aside the election not contained in the objections attached to the Notice of Hearing. In this connection, Local 245 also sought to introduce a letter to the Commission dated May 29, 1969, in which there appears "support of the allegations set forth in (the) letter of May 16, 1969. . ." Such "support" contains a restatement of the "grounds" heretofore filed together with additional matter and elaboration of initial grounds. Thus, as to additional matter, there is the following:

"1. The election itself was not properly regulated or controlled. What purported to be a ballot box was nothing more than a cardboard box with the top open. The ballot box was removed from the voting place numberous times and out of sight of the observers. Ballots were permitted to be taken out

> of the voting place. This would have to be obtained by testimony."

And as to elaboration of initial grounds, there is the following:

> "2. List of names and addresses to be furnished. By agreement Local 245 was to be furnished with a list of names and addresses of all Public Works employees eligible to vote. A list of names without addresses was furnished. The list DID NOT INCLUDE ALL PUBLIC WORKS employees. The list duplicated many names and it was furnished two days BEFORE the election and was of no use to Local 245. The list also included employees who were NOT eligible to vote."

Local 1959 contends that the grounds contained in the letter of Local 245, dated May 16, and attached to the Notice of Hearing as the objections, are the sole objections involved in this proceeding inasmuch as additional objections in the May 29 letter of Local 245 were untimely filed. Local 245 argues that the Commission's Rules and Regulations governing the filing of objections were not in effect at the time of the letters, that it had not received a copy of the proposed Rules and Regulations, and that the Commission had asked for an additional statement when it requested Local 245 to "elaborate" on the grounds set forth in the letter of May 16. The Hearing Officer reserved decision while permitting evidence bearing on additional grounds for objections pending a later ruling.

19:11-19 (f) of the Commission's Rules and Regulations and Statement of Procedure provides: "Within five (5) days after the tally of ballots has been furnished, any party may file with the Executive Director an original and four (4) copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely. . ." The Rules and Regulations, including 19:11-19 (f), became effective August 29, 1969 (19:19-3). As such the rule in question post-dated the Local 245 letter of May 29 as well as the hearing in this proceeding. In the

absence, therefore, of the 5 day limitation on the right to file objections at all times material herein, and in order to avoid giving a retroactive effect to a rule of procedure, the Hearing Officer shall consider as objections to the election new matter contained in the Local 245 letter of May 29 whether directly so or indirectly as by elaboration of the original grounds in the May 16 letter. Accordingly, the objections of Local 1959 with regard thereto are overruled and the evidence bearing on the additional grounds shall be and hereby is, received.[1/]

B. Objections to the Conduct of the Election

1. List of names and addresses-On March 21, 1969, the representatives of the parties met with Joseph Wildebush, Hearing Officer of the Commission in the pre-election phase of this proceeding. At this meeting, Joseph Yengo, counsel for Local 245, asked that a list of names and addresses of employees eligible to vote in the election be furnished the parties. Wildebush indicated that a list of names would be forthcoming but made no mention of addresses as well. In a letter dated April 1, Joseph Kierce, Personnel Director of Jersey City, sent to Wildebush a list of all employees of the DPW as of the election eligibility cut off date of March 21, including addresses and, in some instances, showing two titles for the same employee. As Kierce explained, the list had been run off from addressograph plates and for that reason the addresses appeared though Wildebush had previously informed Kierce that he did not want addresses. The names of employees in supervisory or ineligible titles had lines drawn through them. The employees with two titles came about, Kierce further explained, because of promotions from junior

1/ Moreover, where it appears that the alleged irregularity is attributed to its own agents, the Commission may, on its own motion, consider the matter without regard to the rule for timely filing. Cf. New York Telephone Company, 109 NLRB 788.

to senior positions or to foreman positions[2/] from one payroll period to another.

On May 2, Kierce visited Lester Wolff at the offices of the Administrator, and gave Wolff as election supervisor herein, a list of all eligible voters in the DPW election, which list included addresses because the list was made up from the addressograph plates. Wolff informed Kierce that under the rules of the Administrator, addresses of employees involved in the election were not sent to any of the contending unions. Kierce stated that he did not have time to delete the addresses whereupon Wolff replied that he and his staff would delete the addresses and then submit the lists to the unions. On Friday, May 9, Yengo's office received a copy of the list of eligibles, the first two pages of which contained addresses inadvertently left there by the Administrator. On Monday, May 12, Thomas DeCarlo, President of Local 245, was shown the list by Yengo at the latter's office. DeCarlo expressed dissatisfaction with the list as lacking addresses and he and Yengo paid a visit to the City to complain about the absence of addresses. At noon on the day of the election, Thursday, May 15, Yengo appeared at the polling place and gave DeCarlo the list which he, Yengo, had received from the Administrator. Meanwhile, that morning, DeCarlo had been given a copy of the list of eligible employees by Robert Klingensmith, a representative of Local 1959 after DeCarlo had protested to Wolff that he had not been furnished a list. The list supplied by Klingensmith was the same as that received by Yengo except that on this copy none of the pages contained addresses.

It is contended by Local 245 that an agreement existed to furnish the

2/ It is noted that employees in foreman titles were eligible to vote inasmuch as these positions were included in the negotiating unit as non-supervisory.

unions with a list of names and addresses and that the absence of addresses prevented communication with employees at their homes. In the light of the credible testimony set forth above, the Hearing Officer finds that no agreement existed to furnish addresses, that under the election rules of the Administrator and the Commission applicable herein, addresses of employees were not required to be given the contending unions, and that Local 245 received in substance the same list of eligible employees as that received by Local 1959 and at about the same time, i.e., six days before the election. Whether or not the Commission should adopt a "names and addresses" requirement as a rule of prospective application in aid of communication and minimization of challenges,[3/] is not for the Hearing Officer to determine. It is sufficient that Local 245 has made no showing of any prejudicial or disparate treatment by the lack of addresses. The objection is without merit; it is recommended that it be dismissed.

2. The list did not include all DPW employees-The challenged ballots numbered 24, of which 20 ballots represented employees challenged because their names did not appear on the voting eligibility list. From this fact, Local 245 objects that the list did not include all the DPW employees and it was deprived of the opportunity to reach the 20. But, as Local 1959 maintains, the objection assumes as proved the very question raised by the 20 challenged ballots. The list furnished by DPW constituted the employees in the negotiating unit eligible to vote. Whether or not additional employees were eligible could only be determined by investigation of the challenged ballots, a matter not involved in this proceeding. At the time of the balloting, therefore, the list provided the complete number of eligibles based on titles included in the negotiating unit. Hence it does not

3/ Cf. Excelsior Underwear, Inc., 156 NLRB No. 111

follow, as Local 245 would have it, that simply because 20 employees presented themselves during the course of the voting and claimed a right to cast a valid ballot though they did not appear on the list, ipso facto, the 20 then became or, indeed, under the deceptively mechanical reasoning of Local 245[4], were eligible voters from the start.

The Hearing Officer finds that the unions were furnished with a complete list of those DPW employees eligible to vote subject to whatever challenges might develop in the course of the balloting. No more was required to be furnished and no more could be furnished.[5] The objection is without merit; it is recommended that it be dismissed.

3. The opening in the ballot box: The ballot box, a type commonly used in union elections, was supplied by the Administrator. What became a ballot box started as a collapsed cardboard, capable of being assembled and sealed as a box. At the commencement of the voting and before the actual sealing, an election clerk held the box high and asked the official observers of the parties whether there was any objection. None was voiced. At the end of the balloting, Wolff, the election supervisor, stood at the box[6] in the presence of the observers and inquired if there

4/Local 245 glosses over the difference between a list of all DPW employees and all eligible to vote DPW employees. The former was not relevant; the latter was supplied.

5/It is alleged by Local 245 that "the list duplicated many names. . ." As heretofore found, the duplication occurred by reason of the double titles. There is no showing that the employees so affected voted more than once. It is alleged that "the list also included employees who were not eligible to vote". As heretofore found, employees in foreman titles voted because they were considered non-supervisory. At the hearing reference was made to an assistant superintendent as having voted. This remaines unsubstantiated. These objections are without merit.

6/Whether Klingensmith's testimony is that Wolff had his hands "in" or "on" the box while standing at the box, I find it unnecessary to determine. In any case, the opening was larger than ballot admission size and large enough to allow the box to be carried by a hand inserted in the opening down to the palm.

were any objections to the conduct of the election. Klingensmith replied to the effect that he had none but reserved the right to make objections later. At that point, Yengo made the same comment. Thereupon Wolff broke the seal, emptied the box of ballots and the count began.

The dimensions of the opening in the ballot box through which ballots were deposited, were the subject of varying descriptions by the witnesses for Local 245 and Local 1959. According to the former, the opening was large enough not only to deposit a ballot but also to put a hand through. According to the latter, the opening was of appropriate ballot admitting size. According to the testimony of DeCarlo, a female election clerk put her hand in the opening as far as her palm in carrying the box. According to George Porper, an official observer of Local 245, a female election clerk put her hand "in the flap" of the box while carrying it. However, no witnesses saw a hand actually go through the opening at any time during the course of the election.

It appears that the objection is made that the opening on the top of the ballot box was large enough to make tampering possible. I find that the opening was large enough to permit a hand to enter to the palm. I further find that there was no evidence adduced of actual tampering with the ballot box. Insofar as conceivable possibilities of irregularities may be nurtured by the circumstance that the opening was larger than necessary to admit folded ballots, such speculations inhere in many elections since ideal standards cannot always be attained. I conclude on the basis of the aforesaid findings that no reasonable possibility of irregularity inhered in the conduct of this election because of the size of the opening of the ballot box. [7/] The objection is without merit; it is recommended that

7/ Cf. Polymer, Inc., v. NLRB, USCA 2nd Circ., July 24, 1969, where the rule employed herein is set forth.

it be dismissed.

4. The moving of the ballot box- Though originally scheduled to be conducted at the main office-east coffee room, Jersey City Public Works Garage, the site of the election was changed at the request of Local 245, to the adjoining glass room or glass house so-called because of the outer walls of glass. According to DeCarlo, a female election clerk of the Administrator took the ballot box off the table in the glass room and carried it out of the room and out of sight of the observers. The removal of the ballot box would occur during a lull in the election when the clerk would want "to be alone and talk to her friends, so she would take the box with her." DeCarlo testified further that he observed the moves from the sidewalk outside the glass house where he was able to see inside the glass house and that he told his observer to watch the girl with the box. At about mid-morning, according to DeCarlo, the ballot box was moved down the hallway; he told his observer to protest and he, himself, protested to Wolff a couple of times but Wolff said he, DeCarlo, was not supposed to be near the place.

Porper testified that he saw the ballot box moved to a point near the employees' lunchroom and again to a point adjacent to the time clock. The voters would mark their ballots in the lunchroom and deposit the ballots in the box outside where a clerk was stationed. The voters also voted in the locker room and when a back-up occurred, in the men's room as well, and deposited their ballots in the box located at the lunchroom. Porper testified that he protested the use of the men's room as an extra voting booth. The locker room was connected with the men's room by a passageway and with the lunch room by a door. A door opened from the men's room to the hallway in the vicinity of the ballot box.

Porper testified further that he observed an election clerk move the

ballot box, hand in the flap, to speak to another clerk away from the glass house and down the corridor. In answer to Porper's question as to where she was going, the clerk said, "This box goes wherever I go." Porper followed and did not let the box entirely out of his sight.

Porper also testified that he saw a voter, Tommy Lyons, take his ballot, go through the time clock area to the garage door, at the same time asking where Local 1959 was on the ballot, where do I vote, and who do I vote for? Porper protested. A clerk went after Lyons and said to him, "You're not allowed to do that!" Lyons went into a room and voted unaided.

Joseph A. Trillo, an observer for Local 245, testified that on two occasions he saw an election clerk go into the voting room in response to a voter's request for assistance because the voter could not see without his glasses. Trillo objected. On one of these occasions, the clerk took the ballot box with her into the voting room and out of sight of the observers.

Carmine Sarao, an observer for Local 1959, testified that the ballot box was first place in the glass house where it remained for one-half hour. Due to the number of persons moving in and out at that location, Wolff decided to move the box down the hallway to a point adjacent to the employee's lunchroom. No party objected.

It is established from the uncontroverted testimony that the choice of the glass house as the voting place instead of the original location was that of Local 245 and that moving the ballot box from the glass house to the area of the employees' lunch room was concurred in by all observers. Indeed, it could not have been otherwise for the move was for the purpose of facilitating the physical aspect of the voting process. Apart from this necessary relocation of the ballot box,

sanctioned and observed, it appears from the testimony of Trillo, that the ballot box was taken by a clerk out of sight of the observers on one occasion in going to the assistance of a voter. On another occasion, a clerk assisted a voter but apparently did not take the box with her. This testimony is not controverted. It is clear from Porper's testimony that the box did not leave his observation. DeCarlo's testimony, on the other hand, would present a state of frequent movement of the box out of sight of the observers. But DeCarlo did not have the vantage point of an observer; as a non-observer, he was confined to looking in from the outside. A good deal of the time the ballot box was located down the hallway beyond his ken. DeCarlo's testimony on the movement of the ballot box is unprecise and given to generalities. It is not entitled to the same probative value as that of others. What then emerges from the credible testimony is that an election clerk, on occasion, walked about ballot box in hand but not out of sight of the observers; and that on one occasion, a clerk took the ballot box with her into the voting place.

While the attachment of the election clerk to the ballot box to the extent of walking the box bespeaks a protective zeal, it overlooks the fact that the clerk too may arose suspicion by seeming to leave or by actually leaving the company of the observers. Aside from relocating the ballot box as part of a relocation of voting areas, proper election practice calls for a stationery rather than an ambulatory box. However, in the instant circumstance, more is needed than merely a single occasion when the election clerk did actually leave the sight of the observers, to support a finding of irregularity that would warrant setting the election aside. I am of the opinion and conclude that with regard to ballot

box movement, no real basis exists for sustaining the objection made under this heading.[8/]

On the other hand, the entry of the election clerk into the voting place, equivalent to booth, on two occasions in assistance of glassless voters, presents a markedly different aspect quite apart from any accompanying ballot box in the clerk's hand. It is axiomatic in election procedures generally that an election clerk may not enter the booth with the voter. All explanations of the ballot are required to be made in the presence of an observer from each party. No less is dictated by the unalterable nature of the process, i.e., selection of representative by secret ballot. Here it is not a question of conceivable possibility of irregularity as opposed to reasonable possibility. The command of the Act is secrecy[9/] and the presence of more than one in the voting place, albeit an agent of the Administrator come in assistance, is sufficient to establish objectionable impropriety. I conclude therefore that by being present in the voting place while voters were casting their ballots, the election clerk violated the secrecy of the ballot and the sanctity of the election. And though no objection was expressly alleged on this score, the matter is of such fundamental concern that the Commission

8/ I find, as evinced in the testimony of Porper, that Lyons was not assisted in voting and that his straying in the area of the garage door is hardly tantamount to proof that, as Local 245 asserts, "ballots were permitted to be taken out of the voting place."

9/ Section 6 (d) states: "The commission, through the Division of Public Employment Relations, is hereby empowered to resolve questions concerning representation of public employees by conducting a secret ballot election. . ."
The use of the locker room and men's room as additional voting places, though not the most suitable arrangement to preserve secrecy, nevertheless was unavoidable under the circumstances. Moreover, there was no evidence of actual invasion of secrecy in the use of these areas.

may, in protection of the integrity of its process, set aside the election on this ground. I so find and recommend.

4. The holding of the election on May 15: On April 28, 1969, Kierce, Robert C. Murphy, President of Local 1959, Yengo and DeCarlo, met in Wolff's office at the Administrator.[10/] They discussed the date of the election. Yengo indicated that Local 245 wanted the representation election to take place before May 13, the date of the mayoralty election in Jersey City. Kierce objected on behalf of the City stating that holding the representation election before the municipal election would interfere with the latter. It appears that Murphy had no objection to holding the election before the May 13 mayoralty election. Yengo, Murphy and Kierce then got on the phone with Louis Aronin, Deputy Executive Director of the Commission, who indicated doubt that the election could be held before May 13, in view of the pending run-off election at Jersey City State College. Aronin advised that the Commission would make the final decision. By wire dated May 1, the Commission advised the parties that "The election is scheduled for Thursday, May 15, 1969, which the Commission finds is the earliest date the election may be conducted."

In sum, therefore, while the unions agreed to a pre-mayoralty election date, the City did not. Hence there was no agreement between and among the parties on the date of election. Local 245 maintains that it was prejudiced by not holding

10/ Yengo testified that at an earlier meeting (March 21) with Wildebush, Yengo was assured by Wildebush that the election would take place before the date of the Jersey City mayoralty election. Kierce, who was present at this meeting, testified that he doubted that the date of the election was discussed. In any event, as the Hearing Officer finds, the fixing of a date was a matter for the Commission to ultimately determine.

the election before the municipal election. Local 245 does not set forth in what way it was prejudiced. However, the question of the date on which a representation election shall be held is for the Commission to determine in the exercise of its administrative discretion taking into account, as the Commission did here, the wishes of the parties. The objection is without merit; it is recommended that it be dismissed.

5. 448 employees signed the registry for voting and there were 449 ballots cast- The tally of ballots shows 448 voters' signatures and 449 ballots cast. This result prompted exhaustive recounts of the ballots and reexamination of the list of signatures by the Administrator and the representatives of the parties. After a considerable period of time without accounting for the discrepancy, the parties agreed to sign a tally of ballots stating thereon the fact of the one vote variance without explanation. Yengo, who was present at the counting of the ballots, demanded that the ballots be impounded and the election voided.

DeCarlo and Yengo both testified that at the recount, Sarao said Mildred Avella, an employee on the eligibility list, had cast the missing vote. Sarao testified that, looking in outside the glass house, he saw Mildred Avella go up to the table in the glass house and leave in six minutes. He denied that he said at the recount that the vote that couldn't be found was Mildred Avella's. Sarao testified further that an election clerk said that she had checked her "registry" and the only one who didn't sign was Avella. [11/] Klingensmith testified that the

11/ Sarao's testimony at this point is not clear as to whether he was referring to the "registry" or the list of eligibles the observers and clerks used to check off the voters.

name of Avella came up when someone, maybe Sarao, said Avella had voted. He testified further that he, Klingensmith, "thinks" Sarao said "I'm pretty sure she voted." According to Klingensmith, one observer's list of eligible voters showed Avella's name as checked off or having voted but that the parties could not agree as to whether or not Avella had voted. They finally agreed only to witness that the number of signatures of voters and the number of ballots cast were accurate sums. Murphy, who was present at the count, testified that he did not hear Sarao say Avella voted in the election.

Though much testimony was taken as to whether the ballot in excess of the number of voters who signed the registry was that of Mildred Avella, and more particularly whether Sarao did or did not say at the recount that Avella had voted, what Sarao said at the recount would not resolve the question of the validity of that ballot. This is so because the parties involved in the recount could not agree that the ballot in question was cast by Avella even assuming Sarao said so at the time. And there was no evidence adduced on this record which was not before the parties at the recount. Avella was not called. In these circumstances, the Hearing Officer concludes that the excess ballot remains no more accounted for in this proceeding than at the recount. Stated otherwise there is no finding warranted herein which would establish the vote cast as the ballot of an eligible or an ineligible employee. It is appropriate therefore to entertain the objection of Local 245 that: "This election could be decided by one vote and for this reason alone the election should be voided."

Inasmuch as the challenged ballots are sufficient in number to affect the results of the election, the possibility presents itself that following a resolution of the challenges, the outcome may be affected by one vote. In that contingency the excess ballot over the number of participating voters would be decisive. Commingled with the mass, that ballot cannot and may not be separated and, as previously indicated, it is not establishable as that of an eligible or an ineligible voter. One cannot say that a majority of the valid ballots inclusive of the excess ballot would be determinative for that would mean treating the ballot in question as that of an eligible voter; on the other hand, one cannot say that one vote more than a majority would be determinative for that would mean treating the ballot in question as that of an ineligible voter. Unlike the challenged ballots therefore, the excess ballot remains an unresolvable factor. Yet it is of paramount importance in the conduct of the election that the Commission's mandate under the Act to ascertain the choice of negotiating representatives, if any, be executed with such safeguards of definiteness and regularity as to leave no room for doubt that the final results accurately and truly reflect the wishes of the participating eligible employees.

It seems to the Hearing Officer that the discrepancy between the number of participants and the ballots cast raises a serious question concerning the manner and means employed to process and record the employees as they appeared, were qualified, and handed a ballot to cast. Whether the fault lay in improvising a "registry" out of a yellow pad, or in using a multiple of lists of eligible voters for checking purposes by observers as well as election clerk in place of <u>one</u> list to be used by the election clerk, the fact of the irregularity is unexpungable.

And to merely await the outcome of the challenges so as later to deal with the excess ballot if need be, would only entertain a mere fortuity*/ in place of meaningful certainty as to the steps to be employed at each phase of the Commission's election process for the purpose of assuring that all eligible voters, and no others, who present themselves at the polling place may cast a ballot and have that ballot counted. In sum, whether the discrepancy be one or 100 ballots, the error involved is of such fundamental nature that it affects the essential reliability of the conduct of the election and stands in the way, under proper procedures, of finalizing the validity of the majority choice of the eligible voters.

For these reasons, therefore, I find that the Commission is unable to certify as to the reliability and validity of its own balloting procedures. Accordingly, the undersigned considers the objection has merit; it is recommended that it be sustained.

*/Cf. T & G Manufacturing, Inc., 173 NLRB No. 231, where the excess commingled ballot was stipulated as that of an ineligible voter and the Board ruled that if one vote proved determinative, the election was to be set aside and if one vote was not determinative, a certification would issue. Here, if one vote were to prove determinative, the disposition of that vote would not be ascertainable and the Commission's procedures would lack definiteness and finality. See Great Eastern Color Lithographic Corp., 131 NLRB 1139, where the excess ballot was determined as that of an ineligible but the vote could not have an impact upon the results of the election and was not counted.

B. Objections to Conduct Affecting the Results of the Election

1. Equal time and opportunity to campaign-Kierce testified that approximately five days before the election, John F. Moriarity, Business Administrator of the City, ordered that DeCarlo and Murphy be given equal time off for campaigning so that there would be no controversy and that time was given equally. DeCarlo testified that he and John Flanagan were given four or five days off to campaign after taking up the matter with City officials but that Local 1959 had all the time they wanted and the use of a City car while DeCarlo, a truck driver, had only a one-ton truck. According to Kierce, Murphy did not obtain more that 5 days' time off to campaign. Murphy asserted that he was given one day off to campaign, May 14, and that he was accompanied by Sarao.

Based on the credible testimony of Kierce, I find that Local 245 and Local 1959 both received equal time off to campaign in the election. I further find that there is absent evidence that DPW accorded favored treatment by extension of time or facility to Local 1959 or that Local 245 suffered impairment in its ability to propagate its views among the employees concerned. The objection is without merit; it is recommended that it be dismissed.

2. The City negotiated with Local 1959 while the election for bargaining agent was pending: The request for an election in a unit of DPW employees was made by Local 245 in a letter to the Commission by Yengo, dated January 23, 1969. The City addressed a letter to the Commission, dated February 4, 1969, in which it stated that since a controversy exists the City requests an election. Thereafter, in a letter to DeCarlo, dated February 7, 1969, Kierce, on behalf of the City, stated:

> "Please be advised that negotiations between the City and Local 1959 AFL-CIO have been discontinued until the sole bargaining agent for Jersey City employees has been determined by the Public Employment Relations Commission."

Prior to this time, the City and Local 1959 had been involved in negotiations for City employees generally beginning in May 1968, prior to the enactment of the Act. After the City advised Local 245 as in the Kierce letter of February 7 quoted above, no further negotiations with Local 1959 involving the unit of DPW employees took place.[12/] I so find. The objection is without merit; it is recommended that it be dismissed.

3. Joint sale of insurance and membership drive by Local 1959: For some years prior to and continuing after the initiation of the representation proceeding herein, Local 1959 solicited enrollment in group life insurance among the public employees of Hudson County and the governmental entities located therein. The insurance program underwent changes early in 1969 in that the high risk factor caused a previous carrier to drop the group with the result that a new carrier was sought and found. The latter event necessitated new enrollment in the New Jersey Public Employees Benefit Trust created by Hudson Council No. 2 of the New Jersey Civil Service Association and the Civil Service Benefit Association of Hudson County, Inc. Local 1959 which takes in as members public employees of and within Hudson County, is affiliated with Hudson Council No. 2.

By letter dated February 27, 1969, addressed to members of Local 1959 and signed by Murphy as President of Local 1959, to which was attached a form for

12/ Further evidence of the standstill is afforded by the pre-election leaflets of Local 1959 charging Local 245 with blocking negotiations for DPW employees while negotiations for other City employees continued.

group insurance enrollment and Local 1959 membership separable by a perforation, the creation of the trust referred to heretofore, "to provide Group Life Insurance for all our members", was announced. The letter goes on to state that "As of February 1, 1969, all members of Local 1959 have been insured" and indicates the benefits under the new life and accidental death policy. The letter adds that the program was attainable "only because of the large membership of Local 1959 and its affiliation. . ." The letter continues in part:

> "As a member of Local 1959 your dues are $4.00 per month. From out of these dues and monies we get from your employer, your insurance program will be paid for you. . . You will also receive all the other benefits as a member in the fastest growing local in the Country--Your local 1959 and receive all the other benefits of Union membership in Local 1959. . .
>
> "The enclosed insurance enrollment card must be completed and signed by you in triplicate on both lines marked "X" . . . Also sign the union enrollment card. . .Return the cards at once so you may be properly insured."

By letter dated April 10, 1969, signed by Michael McFaul, President of Civil Service Employees Benefit Association of Hudson County, headed "Important Notice to Members of Civil Service Employees Benefit Association of Hudson County," and addressed to "Dear Member", a reminder is given of the previous mailing of "an enrollment card for insurance under a policy. . .which was issued by the New Jersey Public Employees Benefit Trust." The letter goes on to advise the prompt return of a signed enrollment card "If you wish to continue your insurance. . ." The letter indicates that if the enrollment card is not returned before April 22, 1969, the coverage will terminate. The letter closes with "You may also return membership application for Local 1959. . . in the same envelope."

The two part insurance enrollment form and Local 1959 membership

application adverted to previously provide for authorization of premium deduction and dues deduction by an employer from the employee's earnings. Murphy, who is also a trustee under the insurance program, testified that a public employee desirous of enrolling in the group life insurance program, need not apply for membership in Local 1959 but, instead, may forward the separable insurance part of the form alone. In such case, the Civil Service Employee Benefit Association will allow the employee to take out insurance.

It is argued by Local 245 that the employees involved in this proceeding were told that they had to be members of Local 1959 in order to obtain the insurance and that Local 245 was prejudiced thereby. Local 1959, on the other hand, maintains that obtaining membership in Local 1959 was not made a condition of acquiring insurance, that an employee could tear off and send in the insurance form without the membership application, and the object of the efforts of Local 1959 and the Civil Service Benefit Association was to gain additional employee enrollment without regard to union membership so as to overcome the problem of high risk, high cost and limited enrollment.

In assessing the relationship between membership in Local 1959 and enrollment in the group life insurance, it is necessary to measure the efforts of Local 1959 in the light of whether it may be said that the DPW employees could reasonably believe that the insurance would be available to them only if they joined Local 1959. Though the matter of the alleged material inducement of votes in favor of Local 1959, in plainer language a buying of votes, does not end with the answer to the foregoing question, it certainly marks the beginning of inquiry. In this regard, therefore, the assertions of Local 1959 that it was engaged in

efforts to enlarge the number of participants in the group in order to assure the existence and continuity of coverage on a County-wide basis regardless of union membership, while not without significance, cannot provide the sole answer. And, indeed, when examination is had of the February 27 letter urging members to sign the enrollment and membership cards, it would appear that the insurance was presented to the members (including employees of the City) not only as a benefit made possible by "the large membership of Local 1959 and its affiliates", but also as a benefit to be realized by execution of both the insurance and the union dues deduction forms. Thus, this letter states that the "insurance enrollment card must be completed and signed by you in triplicate on both lines marked "X". The form itself exhibits "X" on line 12 of the insurance part and at the last line of the dues card and at no other places. The letter also instructs "Also sign the union enrollment card." If there remained any room for doubt as to the instructions to sign both cards in view of the apparent redundancy of the last quoted sentence, the doubt would appear to have been allayed by the last sentence: "Return the cards at once so that you may be properly insured." It is apparent that "properly insured" would, when taken with the previous instructions, convey the meaning that insurance and dues went hand in hand.

The letter of April 10, from the president of the Benefit Association, on the other hand, addressed to members of the Benefit Association rather than Local 1959, points to a deadline for return of the enrollment card on pain of losing insurance coverage. Plainly, the previously covered participants in the group policy hitherto in effect, were told once more of the necessity for re-

enrollment but, this time, was an absence of any tie to execution of the union dues deduction card. Those former participants in group insurance who were never members of Local 1959 or conceivably had let their membership lapse, were this time given the choice of returning the union membership application rather than instructed, as previously, "Return the cards at once so you may be properly insured." Unlike the letter of February 27 , the whole thrust of the later letter was upon execution of the insurance card before the deadline as a sole condition precedent to obtaining insurance coverage.

The later letter must be considered in the context of the County-wide efforts of Local 1959 to increase participation in the plan as an actuarial rather than a union membership concern. Certainly the import of the later letter together with the separability of the form, could reasonably be said to be such as would lead an employee of DPW, in the weeks immediately preceding the election, to believe that the insurance was obtainable without having to become a member of Local 1959.

Even assuming arguendo that the effects of the earlier letter were not dissipated by the later letter, the benefits derived from enrollment in the group insurance held no such tangible enhancement of the employees' economic position as to conclude that the employees were constrained thereby to vote for Local 1959.[13/] This benefit was no gift, no purchase of votes, but rather a modest insurance in return for employee paid premiums deducted from earnings. Nor did it represent

13/ Cf. Wagner Electric Corp., Chatham Division, 167 NLRB No. 75

a gain over pre-existing conditions in the sense of making a group available for low insurance rates. The group made up of civil service employees in the County had come about many years before the reenrollment drive. Moreover, there is no indication that the enrollment efforts were tied in any way to the pending election or its outcome. From aught that appears, the success or failure of Local 1959 in the representation election would not affect the life insurance program which did not depend on collective negotiations but could be and was sustained as an internal, County-wide organization matter.[14/] For all the foregoing reasons, I find that the sale of group insurance by Local 1959 did not interfere with freedom of choice of negotiating representatives in the representation election. The objection is without merit; it is recommended that it be dismissed.

4. Local 1959 was represented by management in the person of Robert Murphy-President of Local 1959, Murphy is one of three Assistant Directors of Sanitation in the DPW, a position involving supervision over sweepers and one which he has held for the past three years. Murphy considers himself a supervisor; he was not eligible to vote in the election. I find that Murphy is a supervisor within the meaning of the Act.

As heretofore indicated Local 1959 admits to membership and seeks to represent employees of all the municipalities of Hudson County, the County itself, and all other public employees in the County. In the instant negotiating unit, some 500 employees are involved. Prior to the filing of the "petition" herein Murphy, as already noted, conducted negotiations on behalf of Local 1959

14/ Cf. Humble Oil & Refining Co., 160 NLRB No. 62

with the City, including DPW employees, and since that time has continued to negotiate for other City employees. In the course of the pre-election campaign, Murphy distributed leaflets on behalf of Local 1959, spoke to employees involved herein about grievances, and solicited enrollment in the group insurance plan as well as membership in Local 1959.

Local 245 argues that by virtue of Murphy's position as supervisor and part of management while at the same time holding office in Local 1959 and conducting the foregoing activities on its behalf, the latter organization is disqualified from representing the employees involved herein. Local 1959, under these circumstances, it is said, becomes in effect, a "company union". Local 1959, in reply, contends that the Act and pertinent decisional law permit an employee organization to have a supervisor as member and therefore as officer; and that while Murphy is a supervisor at DPW, he is President of an employee organization that is County-wide rather than confined to DPW.

It is not questioned that an employee organization may admit to membership supervisory employees without such membership working a denial of the right of that organization to represent the appropriate unit in collective negotiations. The limitation is with respect to representation of supervisors in collective negotiations by an employee organization that admits nonsupervisory personnel to membership. These propositions follow from the plain provisions of the Act which, in Section 7, states, in relevant part: "nor. . .shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership, and the fact that any

organization has such supervisory employees as members shall not deny the right of that organization to represent the appropriate unit in collective negotiations. . ." Having thus granted the right of supervisors to be members of an employee organization of nonsupervisory personnel, does the Act go further and impliedly grant the right of supervisors to hold office in the employee organization as well?

Membership in a labor organization at common law carries with it an obligation on the part of the member to adhere to the by-laws or constitution of the organization and concomitantly therewith to enjoy the rights and privileges accorded membership standing under the same organic document. It is posited on a contractual relationship between the member and the organization, the terms of which are governed by the constitution and by-laws which neither may violate without incurring the consequence of a breach thereof. A normal and characteristic incident of membership in an employee organization is the right to hold office subject of course to the eligibility and other prerequisites of attainment embodied in the applicable by-laws of the organization.

Statutory recognition of the right to hold office as a normal and characteristic incident of membership in a labor organization is contained in the Labor-Management Reporting and Disclosure Act of 1959 which sets forth in Title IV, Section 401 (e): "In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office. . ." Such standard, though imposed by Federal statute applicable to labor organizations in industry affecting commerce, nevertheless may be taken as

illustrative of a publicly sanctioned norm of membership attributes affording guidance herein.

In the opinion of the Hearing Officer the framers of the instant Act by permitting "supervisory employees as members" of employee organizations, did not intend at the same time to restrict the rights of membership by denying sub silentio that which flows from the very right expressly granted. Absent any indication in the statute that the right of membership is subject to a limitation as to holding office, the term "members" must be given its normal and accepted attribute. I find therefore that a supervisory employee may, as here, hold office in an employee organization that admits nonsupervisory employees to membership. Such finding, however, is not dispositive of the precise issue before the undersigned for it must be determined whether or not the right of a supervisor to be an officer of an employee organization extends to the circumstance where the employee organization negotiates on behalf of employees some of whom are supervised by the very supervisor officer in question.[15/] In other words, the status of Murphy

15/ This latter question is not fully answered by Simon, et al v. Journeymen Barbers, Local 315, LL N.J. 448, 44 A. 2d. 840; or Journeymen Barbers, Local 687 v. Pollino, et al, 22 N.J. 389, 126 A. 2d. 144. These cases are authority for the proposition, apart from the Act, that owner-workers and by extension, supervisors, are entitled to be admitted to membership and hold office in a labor organization of their employees. However, those cases did not present the fact, as here, of the supervisor officer of the labor organization actually representing his own employees. Indeed, in the second of these cases, the Court obtained assurance from counsel for the Barbers Union that the latter organization would not invoke disloyal and dual unionism provisions of its constitution against barber owner members for seeking to represent their owner interest on behalf of the employer group in negotiations with the Barbers Union. Seemingly, therefore, the Court is saying that owner workers and supervisors may be members and officers of the employee organization so long as their ownership or supervisory interest in representation is kept separate from their employee interest. Here the question may be posed as whether the interest of Murphy as officer of the employee organization and his activities on its behalf and on behalf of the employees involved may be said to be separable from his interest as supervisor of DPW.

supervisor in the Department of Public Works (and President of Local 1959), does not per se qualify Local 1959 or make operative the language of the Act in Section 7, i.e., "shall not deny the right of that organization to represent the appropriate unit in collective negotiations. . ."

This is so because Section 7 of the Act also provides that "public employees shall have, and shall be protected in the exercise of, the right freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity. . ." Mindful of the right thus vouchsafed employees freely to partake or not partake in the activities of an employee organization, such right is violated where employees are restrained in their choice of negotiating representatives. And such restraint may arise by reason of control of the employee organization by a public employer through a supervisor who is an officer of the organization.[16/] In such case, the organization is rendered incapable of truly representing the interests of the public employees in collective negotiations and the employees who participate must be regarded as having done so not of their own choosing but out of employer induced compulsion or fear. Could such results reasonably be said to obtain in the circumstances involved in this proceeding?

The Hearing Officer is of the opinion that no such disabling consequences are evidenced on this record considered as a whole. No proof was adduced that Murphy, in his capacity as President of Local 1959 or otherwise, determined policy

16/ Cf., Brunswick Pulp & Paper Co. 152 NLRB NO. 111

or conduct of that organization or that Murphy held himself out as constituting the seat of authority in Local 1959. While Murphy did engage in organizational and campaign activities as well as represent Local 1959 in negotiations with the City on behalf of these and other employees, there is absent any evidence that, in so doing, Murphy could or did make Local 1959 subordinate to one man's control. It is of significance, in the judgment of the Hearing Officer, that Local 1959 was not confined in its membership or activities to DPW employees but rather extended County-wide thus making one man control difficult to achieve. Nor is it likely that, given the scope of Local 1959's activities among public employees generally, the employees of DPW viewed Murphy as a supervisor come to coerce them into a "company union" rather than as a bona fide union leader.

Furthermore I am persuaded that the status of supervisor under the Act must be scrutinized with care lest the disqualifying conseqences that sometimes result in private industry are uncritically visited upon organizations of public employees. In industry under the National Labor Relations Act, as amended, a supervisor is quite clearly removed from the protection of the Act and therefore may neither pursue representation nor, with certain recognized exceptions, unfair labor practice procedures. All that remains in industry is that a labor organization may admit supervisors to membership without losing its standing as a labor organization.[17/] The instant Act, however, does more than allow supervisor membership

17/ But a labor organization "in which employees participate" under the federal law may admit substantial numbers of supervisors to membership without losing its standing as a "labor organization". International Organization of Masters, Mates & Pilots of America, AFL-CIO, 144 NLRB 1172, affd., 351 F.2d. 771 (CA DC). Great Lakes Towing Company, 168 NLRB No. 87.

in an employee organization. It protects the right of supervisors to form and join organizations and negotiate terms and conditions of employment in units confined to supervisory employees (Section 3 (d) and (e); Section 6 (d); Section 7). It defines as eligible to enjoy self-organization and collective negotiations all supervisors except "elected officials, heads and deputy heads of departments and agencies, and members of boards and commissions, provided that in any school district this shall exclude only the superintendent of schools or other chief administrator of the district." (Section 3 (d)) It does not rigidly exclude supervisors from being "represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership" for such may come to pass where dictated by "established practice, prior agreement or special circumstances." (Section 7) Clearly, therefore, there is not the same treatment of supervisors in the Act, as in the federal law covering industry in interstate commerce. The former does not draw the indictment upon supervisor self-organization that the latter does; the former does not regard as excluded management every supervisor from foreman to executive; and the former does not consider the conflict of interest and potential for management coercion of employee concerted activities as compelling the radical excision that the latter does. It is only the commingling of supervisors and nonsupervisors in the same unit that is restricted under the instant Act and even such a unit may be found appropriate under Section 6 (d) where "dictated by established practice, prior agreement or special circumstances. . ."

And the reasons for the markedly dissimilar treatment, in the view of the Hearing Officer are several. There is apparent recognition by the legislature

that in public employment the inhibitory effect of a supervisor upon self-representation by subordinate employees is tempered by the statutory restraints of protective civil service and other legislation. Moreover, in public employment there is not the identity with private ownership that in industry binds all supervisors in indivisible link to management and dictates severance from the federal law. Indeed, the employer in the public sector by its different reason for being, makes no private interest demands upon its supervisors for all levels are the servants of the people engaged in a public function apart from the market place. Additionally, the extent of public employee organization (among supervisory personnel) at the adoption of the Act, it may be surmised, suggested the compatibility of supervisory with nonsupervisory concerted activities.

In the light of the foregoing considerations, I am of the view that the Act does not support the conclusion that because a supervisor is also an officer of nonsupervisory organization representing, among others, employees over whom he exercises supervisory authority, and himself engages in union organizational activities, it follows as night the day that the organization is disqualified or the employees are "coerced" into supporting the employee organization. Instead, it is my judgment that the Commission must, on a case by case basis, establish whether or not the employee organization is in fact incapable of functioning because though the voice is that of employees, the hand may be that of management.

In this case, I find that Local 1959 was not and is not controlled by Murphy as President or by virtue of his activities on its behalf while at the same time a supervisor in the Department of Public Works. I find further that Local 1959 is capable of properly functioning as an employee organization at the

Department of Public Works with Murphy as President. The objection is without merit; it is recommended that it be dismissed.

Recommendations

Upon the findings and conclusions set forth above, it is recommended that objections numbered 4, as to entry of the election clerk into the voting place (booth) while the voter is casting his ballot, and 5, the excess ballot, be sustained; and that all other objections be dismissed.

It is further recommended that the election held on May 15, 1969, be set aside and a new election held at a time and place to be determined by the Commission.

Jonas Silver, Hearing Officer

DATED: October 22 1969
North Merrick, N.Y.